



Association for Local Telecommunications Services

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April 26, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20054

DOCKET FILE COPY ORIGINAL

Re: Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97 (Phase II); Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-96

Dear Mr. Caton:

On April 26, 1996, the attached letter concerning the above dockets was sent to Mr. James D. Schlichting, Chief, Competitive Pricing Division.

Yours truly,

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Association for Local Telecommunications Services

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RICHARD J. METZGER
GENERAL COUNSEL

April 26, 1996

Mr. James D. Schlichting
Chief, Competitive Pricing Division
Federal Communications Commission
1919 M St., N.W., Room 518
Washington, D.C. 20054

Re: Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97 (Phase II); Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; CC Docket No. 96-96

Dear Mr. Schlitchting:

In light of the Commission's issuance last Friday of an NPRM implementing Section 251 of the Telecommunications Act of 1996 ("Interconnection NPRM"), and also Judge Greene's vacation of the Modification of Final Judgment on April 11, 1996, the Association for Local Telecommunications Services ("ALTS") hereby suggests how these events should be coordinated with the Commission's Phase II investigation of the incumbent local exchange companies' ("ILECs") virtual collocation tariffs (CC Docket No. 94-97; Phase II), and, more generally, how they should be integrated with the basic policy goals of the Commission's overall Expanded Interconnection proceeding.

ALTS believes certain fundamental policy issues -- such as cost and price standards, the definition of "premises," the rules for requesting space where limitations exist, etc. -- raise the same implications for the Interconnection NPRM as they do for the Expanded Interconnection docket, and should be implemented in the same manner in each proceeding. Since these issues have already been set out in the Interconnection NPRM, they should be decided there first, and those determinations should then be promptly incorporated into the Commission's Expanded Interconnection rules.

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However, passage of the 1996 Act and vacation of the MFJ also implicate other important issues which are quite independent of the outcome of the Interconnection NPRM. Accordingly, for the following reasons, ALTS believes these matters can and should be implemented immediately by the Commission.

The 1996 Act and the Vacation of the MFJ Must Be Factored into the Commission's Expanded Interconnection Decisions

It is axiomatic that courts and agencies must apply the organic law in effect at the time of their decisions, absent contrary indications in the law itself or remarkable hardship, even where the applicable law has changed since the closing of the record. Bradley v. School Board of the City of Richmond, 416, U.S. 696, 715 (1974). Thus, Section 251(c)(6) of the 1996 Act (creating a duty to provide collocation), Section 251(c)(3) (creating a duty to provide unbundled network elements), and Section 251(g) (shifting enforcement of the substantive requirements of the former MFJ to the Commission), are all part of the governing law which must be weighed by the Commission when making its Phase II decision, and when issuing further Expanded Interconnection orders in general.

Effect of Section 251(c)(6) and 251(c)(3) on the Phase II Decision

Section 251(c)(6) of the Telecommunications Act of 1996 ("1996 Act") requires ILECs to provide physical or virtual collocation (Interconnection NPRM at ¶ 66). In considering the adoption of standards for implementing this obligation, the Commission has inquired whether it should readopt its "prior standards governing physical and virtual collocation ... We also seek comment regarding whether we should modify those standards, in light of: (1) the new statutory requirements; (2) disputes that have arisen in the subsequent investigations regarding the LECs' physical and virtual collocation tariffs; or (3) additional policy considerations [citing to the pricing requirements for collocation in section II.B.2.d]" (*id.* at ¶ 73).

The Interconnection NPRM is clearly correct in recognizing there should be some linkage between the Commission's Section 251 regulations and its Expanded Interconnection rules. The same fundamental policies ultimately control the Commission's proposed adoption of national standards for implementing negotiated collocation, and its rules for the filing of interstate collocation tariffs by the ILECs. It makes little sense for the Commission to prescribe a specific regime for collocation agreements implementing Section 251(c)(6), while failing to implement those same policies in its own Expanded Interconnection rules.

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While the Expanded Interconnection rules will clearly need to be conformed to the outcome of the Commission's ultimate Section 251(c)(6) decision at the earliest possible opportunity, ALTS also believes the Commission should not wait until then to resolve certain collocation issues which do not turn on the Interconnection NPRM's outcome. These issues include:

- Immediate reissuance of the Commission's "physical collocation" rules;
- Immediate adoption of those portions of the virtual collocation rules which were not included in the Commission's Virtual Collocation order on remand out of a concern they resembled "physical collocation." These include:
 - The requirement that ILECs offer a "\$1 leaseback" arrangement for interconnector designated equipment ("IDE");
 - Rules allowing interconnector-competitors to use non-ILEC personnel to install, maintain and repair virtual collocation equipment at their option.
- Preliminary refunds, with interest, of identified overcharges.

It is clearly necessary to put these requirements into effect now, rather than await the issuance of the Interconnection NPRM decision. Section 251(c)(6) was indisputably included to cure the judicial reversal of the Commission's original physical collocation regime -- a proceeding in which exhaustive pleadings were filed by all parties -- so there is no sensible reason to rehash the merits of physical collocation all over again. While some aspects of the Expanded Interconnection rules applicable to both physical and virtual collocation will need review in light of the ultimate result in the Interconnection NPRM, there is no reason to make interconnector-competitors unnecessarily wait for a form of Expanded Interconnection which the Commission has already blessed, and which Congress clearly intended to be available.

Effect of Section 251(j) and the Vacation of the MFJ

Section 251(j) of the 1996 Act transfers enforcement responsibility over the substantive requirements of the MFJ to the Commission until such time as the Commission expressly supersedes those requirements. Furthermore, the Department of Justice has made its MFJ files available in order to further the Commission's new function, and Judge Greene's order of April 11, 1996, order vacating the MFJ expressly approved the Commission's new role.

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The Commission's assumption of the investigative and adjudicative functions formerly performed by the MFJ court and DOJ has two important implications for the Phase II proceeding. First, now that the MFJ's antidiscrimination standards are fully applicable to the Regional Bell Holding Companies ("RBOCs") in all Commission proceedings, it is manifest the RBOCs can no longer refuse to compare their costing of collocation services with their costing of similar functionalities contained in services to most favored RBOC end users, as amply demonstrated by the facts that gave rise to the Enforcement Order. US West violated the MFJ by offering GSA a price for off-network access from its local exchange tariffs in connection with US West's own switching service that was appreciably lower than the price it was offering from its access tariffs for the same service when provided in connection with AT&T's competing switching service. United States v. Western Electric, 846 F.2d 1422, 1424 (D.C. Cir. 1988).¹

While ALTS believes that the Phase II Order Designating Issues ("DOI") already requires the RBOCs to perform such a comparison -- a comparison they have flatly

¹ The Court of Appeals for the District of Columbia left no doubt about the decree's broad antidiscriminatory reach in rejecting a claim by US West that its provisioning of exchange services to a non-interexchange carrier could not violate the MFJ (United States v. Western Electric, 846 F.2d 1422, 1428-29 (D.C. Cir. 1988; emphasis supplied)):

"Nor is there reason to read limitations into the term ['other person' in section II(B)] that the MFJ's drafters did not supply ... there is no indication, either in the text of the MFJ or in statements made in connection with its composition, that 'other persons,' as that term is used in section II(B), was meant to serve merely as a proxy for 'all interexchange carriers and information service providers.'"

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"If a BOC or a Regional Holding Company were permitted to charge different customers different rates for exchange access or local exchange facilities, depending upon whether those customers purchased other products or services sold by the BOC or Regional Holding Company, then it could, in the court's terms, exploit its 'bottleneck' monopoly over exchange access and local exchange facilities to the detriment of its competitors and ultimately of consumers of telecommunications services."

*

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"It is clearly reasonable to read the MFJ's nondiscrimination provisions in light of its fundamental purpose to stymie efforts by a local monopoly to use its stranglehold upon essential facilities and services to thwart effective competition in areas where its monopoly position was not protected by the MFJ."

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refused to provide, though they have not sought a stay of the ODI -- the new applicability of the former MFJ's stringent antidiscrimination obligations for RBOCs in Commission proceedings serves to underscore the significance of their non-compliance.

Second, the Commission's newly acquired access to all the documents within the scope of DOJ's MFJ functions enables it to review materials which are directly relevant to the particular issue involved here. On October 19, 1996, ALTS moved for expedited discovery of US West's reports to DOJ concerning its compliance with the antidiscrimination provisions of the MFJ in connection with its new services, including virtual collocation.² Now that the Commission has access to these reports, it can review for itself the issue of whether US West is, in fact, complying with the continuing antidiscrimination provisions of the MFJ in general, and US West's Enforcement Order in particular.³

It is difficult to overstate the importance of the Commission's newly acquired ability to review US West's own analyses of its antidiscrimination compliance. The Enforcement Order requires US West to review its new services for discriminatory effect,

² These documents exist because US West violated the anti-discrimination provisions of the MFJ, was required to pay a \$10,000,000 fine, and was forced to put into place and fully document specific business processes which would detect any future attempt at discrimination against services used by US West's competitors, including the virtual collocation services at issue here in the Phase II Order, and to report these analyses to the United States Department of Justice.

³ The fact the Phase II proceeding involves a modified form of rulemaking instead of an adjudicatory proceeding in no way relieves the Commission of its obligation to take note of material and relevant evidence relevant to that rulemaking. US West's Enforcement Order entered February 15, 1991, was imposed to insure compliance with precisely the very policy concerns at issue in Phase II: "US WEST shall establish and maintain a formal process for evaluating its compliance with the non-discrimination provisions of the Modification of Final Judgment;" Enforcement Order, Section A. Section IV(I) makes this review expressly applicable to "new products" offered to "competitors."

"It is further ordered that US WEST's own internal formal process for reviewing business practices shall include any new products US West desires to offer to its end users and/or competitors, including any existing product whose underlying cost methodology, pricing, or interconnection terms or conditions are substantially modified. US WEST shall incorporate the review of the new or modified product into its next report to the Department of Justice."

Mr. James D. Schlichting

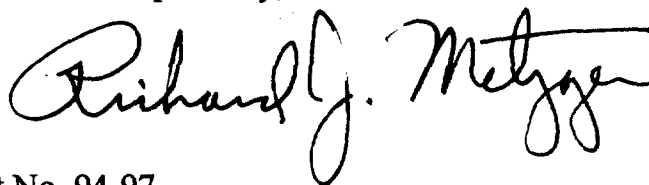
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thereby necessitating precisely the kind of comparison ordered by the ODI, but which US West has refused to provide. The Commission's access to these analyses now permits it to obtain exactly the evidence US West was ordered to submit. ALTS respectfully requests that the Commission immediately obtain this information and incorporate it into its decision.

We would be happy to discuss this matter with you at your convenience.

Respectfully,

A handwritten signature in cursive script, reading "Richard J. Metzger". The signature is written in dark ink and is positioned to the right of the word "Respectfully,".

cc: W. F. Caton
all parties in CC Docket No. 94-97
US West
R. Keeney
J. Olson